

ANNUAL REPORT OF THE JUDICIAL OFFICER

FISCAL YEAR 2015

The Judicial Officer issues final decisions for the Secretary of Agriculture in all cases appealed from initial decisions of USDA's administrative law judges. These cases arise under approximately 40 statutes administered by the Secretary of Agriculture. During FY 2015, the Judicial Officer issued cases arising under the Agricultural Marketing Agreements Act, the Animal Welfare Act, the Commodity Promotion, Research, and Information Act, the Equal Access to Justice Act, the Federal Meat Inspection Act, the Horse Protection Act, the Organic Foods Production Act, and the Perishable Agricultural Commodities Act. The Judicial Officer also issues reparation orders for money damages under the Packers and Stockyards Act and the Perishable Agricultural Commodities Act, issues final decisions in cases appealed from initial decisions of the Commissioner of the Plant Variety Protection Office under the Plant Variety Protection Act, and rules on motions filed by parties to proceedings and questions submitted by administrative law judges. Appeals from the Judicial Officer's decisions lie primarily to the United States Courts of Appeals, but, under some statutes, appeals lie to the United States District Courts. USDA has no right of appeal from a decision by the Judicial Officer.

The Office of the Judicial Officer is staffed by three persons: the Judicial Officer, an attorney, and a legal assistant.

The following two tables provide an indication of the production of the office and the direction of the backlog in the office.

CASES AND MOTIONS RECEIVED – DECIDED – PENDING

	FY 2013	FY 2014	FY 2015
Cases and Motions Pending Beginning of the FY	5	3	3
Cases and Motions Received During the FY	456	396	369
Cases and Motions Decided During FY	458	396	371
Cases and Motions Pending End of the FY	3	3	1

INTERVAL BETWEEN REFERRAL TO JO AND JO DISPOSITION

Fiscal Year	Median Interval	Longest Interval	Number of Cases Over 4 Months	Number of Cases Over 8 Months
2000	3 wks.	6 mo. 2 wk.	1	0
2001	1 wk.	2 mo.	0	0
2002	2 wk.	3 mo. 2wk.	0	0
2003	1 wk.	11 mo. 2 wk.	3	3
2004	1 wk.	1 yr. 5 mo.	4	4
2005	1 wk. 3 da.	1 yr. 6 mo.	3	1
2006	2 wk.	1 yr. 2 wk.	6	4
2007	1 mo. 3 wk.	11 mo. 1 wk.	6	2
2008	2 wk.	1 yr. 7 mo.	10	7
2009	1 wk. 3 da.	1 yr. 11 mo.	9	5
2010	5 da.	7 mo. 3 wk.	10	0
2011	1 da.	5 mo. 3 wk.	2	0
2012	4 da.	8 mo. 2 wk.	4	1
2013	4 da.	1 yr. 2 mo.	9	6
2014	2 da.	9 mo. 3 wk.	2	1
2015	4 da.	9 mo. 1 wk.	5	1

SUMMARIES OF MAJOR DECISIONS BY THE JUDICIAL OFFICER

Fiscal Year 2015

In *Rosberg* (Order Denying Respondents' Pet. for Recons.), FMIA Docket Nos. 14-0094 and 14-0095, decided by the Judicial Officer on October 31, 2014, the Judicial Officer denied Mr. Rosberg and Nebraska's Finest Meats, LLC's Petition for Reconsideration of *Rosberg* (Order Denying Late Appeal), FMIA Docket Nos. 14-0094 and 14-0095, 2014 WL 7405834 (U.S.D.A. Sept. 10, 2014). The Judicial Officer rejected Respondents' contention that the Hearing Clerk did not serve Mr. Rosberg with Administrative Law Judge Janice K. Bullard's (ALJ) Decision on June 23, 2014, stating United States Postal Service records establish the Hearing Clerk served Mr. Rosberg with the ALJ's Decision by certified mail on June 23, 2014. The Judicial Officer also rejected Respondents' contention that they appealed the ALJ's Decision on July 19, 2014, stating the Hearing Clerk's date stamp establishes the date a document reaches the Hearing Clerk and the Hearing Clerk's date stamp establishes that Respondents' appeal petition reached the Hearing Clerk on July 29, 2014. Further, the Judicial Officer rejected Respondents' contentions that the mailbox rule is applicable to proceedings under the Rules of Practice and that the Judicial Officer has jurisdiction to extend the time for filing an appeal after an administrative law judge's decision has become final.

In *Rosberg* (Order Denying Late Appeal), FMIA Docket Nos. 12-0182 and 12-0183, decided by the Judicial Officer on November 7, 2014, the Judicial Officer denied Paul Rosberg and Kelly Rosberg's appeal petition filed one day after Administrative Law Judge Janice K. Bullard's written decision became final. The Judicial Officer held, under the Rules of Practice, the Judicial Officer has no jurisdiction to hear an appeal that is filed after an administrative law judge's decision becomes final.

In *Resolute Forest Products*, ACPA 12-0040, decided by the Judicial Officer on November 26, 2014, the Judicial Officer affirmed Administrative Law Judge Jill S. Clifton's decision denying Resolute Forest Product's (Resolute) petition filed in accordance with the Commodity Promotion, Research, and Information Act of 1996 (7 U.S.C. §§ 7411-7425) (CPRIA). Resolute sought an order terminating the Softwood Lumber Research, Promotion, Consumer Education and Industry Information Order (7 C.F.R. pt. 1217) (Softwood Lumber Order) or exempting Resolute from the Softwood Lumber Order. The Judicial Officer refused to address Resolute's contention that the CPRIA violates the Appointments Clause of Article II of the Constitution of the United States because the CPRIA provides non-appointed referendum voters significant authority belonging to the Executive Branch. The Judicial Officer, citing *Califano v. Sanders*, 430 U.S. 99, 109 (1977), and *Pubic Utilities Comm'n of California v. United States*, 355 U.S. 534, 539 (1958), stated, generally, an administrative agency has no authority to declare unconstitutional a statute that the agency administers. The Judicial Officer rejected Resolute's contentions that the Agricultural Marketing Service unconstitutionally applied the CPRIA by binding the Secretary of Agriculture, without discretion, to implement the Softwood Lumber Order on the basis of an initial referendum vote approving the Softwood Lumber Order, that the Softwood Lumber Order was not approved by a majority of those persons voting for approval who also represent a majority of the volume of softwood lumber, as provided in 7 U.S.C. § 7417(e)(3), that the Secretary of Agriculture exempted more than a de minimis quantity of softwood lumber from the Softwood Lumber Order, in violation of 7 U.S.C. § 7415(a)(1), and that the Agricultural Marketing Service erroneously used the year 2010 as a representative period to determine who would be subject to an assessment under 7 U.S.C. § 7416 and thus eligible to participate in the Softwood Lumber Order initial referendum. The Judicial Officer also rejected Resolute's contention that the initial referendum conducted by the Agricultural Marketing Service was a census and found the procedures for conducting the referendum fully comport with the CPRIA. Further, the Judicial Officer rejected Resolute's claims that the Administrative Procedure Act requires an agency conducting a rulemaking proceeding to refute misleading statements by proponents and opponents of the rulemaking proceeding and that the Judicial Officer erroneously concluded in *Resolute Forest Products* (Ruling on Certified Question), ACPA Docket No. 12-0040, 2013 WL 8208322 (U.S.D.A. Jan. 22, 2013), that Resolute's application for a subpoena

duces tecum did not show the relevancy of, the materiality of, or the necessity for the production of documents described in Resolute's application, as required by 7 C.F.R. § 900.62(b).

In *Tierney* (Order Dismissing Purported Appeal Pet.), OFPA Docket No. 13-0196, decided by the Judicial Officer on December 9, 2014, the Judicial Officer dismissed Michael Tierney's purported appeal petition because it did not remotely conform to the requirements for appeal petitions set forth in the Rules of Practice (7 C.F.R. § 1.145(a)).

In *Tierney* (Order Denying Pet. for Recons.), OFPA Docket No. 13-0196, decided by the Judicial Officer on December 29, 2014, the Judicial Officer denied Michael Tierney's petition for reconsideration of *Tierney* (Order Dismissing Purported Appeal Pet.), OFPA Docket No. 13-0196, 2014 WL 7534276 (U.S.D.A. Dec. 9, 2014). The Judicial Officer rejected Mr. Tierney's contention that his appeal petition was timely because he sent his purported appeal petition to Administrative Law Judge Janice K. Bullard (ALJ) and counsel for the Administrator, Agricultural Marketing Service, United States Department of Agriculture (Administrator), prior to the expiration of the time for filing the appeal petition. The Judicial Officer stated Mr. Tierney's sending his purported appeal petition to the ALJ and counsel for the Administrator does not constitute filing with the Hearing Clerk, as required by 7 C.F.R. § 1.145(a). The Judicial Officer also rejected Mr. Tierney's unsupported contention that he filed the purported appeal petition with the Hearing Clerk on November 17, 2014. The Judicial Officer stated the most reliable evidence of the date a document reaches the Hearing Clerk is the date stamped on that document by an employee of the Office of the Hearing Clerk. The Judicial Officer also rejected Mr. Tierney's appeal of the ALJ's Decision and Order contained in his petition for reconsideration stating a petition for reconsideration is not the proper vehicle by which to appeal an administrative law judge's decision and Mr. Tierney's appeal of the ALJ's Decision and Order contained in the petition for reconsideration was filed 35 days after he was required to file his appeal petition.

In *Rosberg* (Ruling Denying Respondents' Mot. for EofT To File a Second Pet. for Recons.), FMIA Docket Nos. 14-0094 and 14-0095, decided by the Judicial Officer on December 31, 2014, the Judicial Officer denied Mr. Rosberg and Nebraska's Finest Meats, LLC's motion for an extension of time to file a second petition for reconsideration of *Rosberg* (Order Denying Late Appeal), FMIA Docket Nos. 14-0094 and 14-0095, 2014 WL 7405834 (U.S.D.A. Sept. 10, 2014). The Judicial Officer, citing *Heartland Kennels, Inc.* (Order Denying Second Pet. for Recons.), 61 Agric. Dec. 562 (2002), and *Goetz* (Order Lifting Stay), 61 Agric. Dec. 282 (2002), stated that, under the Rules of Practice (7 C.F.R. §§ 1.130-.151), a party may not file more than one petition for reconsideration of a decision of the Judicial Officer; therefore, Respondents' December 2, 2014, request for an extension of time to file a second petition for reconsideration of *Rosberg* (Order Denying Late Appeal), FMIA Docket Nos. 14-0094 and 14-0095, 2014 WL 7405834 (U.S.D.A. Sept. 10, 2014), must be denied.

In *Smith*, EAJA Docket No. 14-0020, decided by the Judicial Officer on January 2, 2015, the Judicial Officer awarded Le Anne Smith \$16,110.83 for attorney fees and other expenses which she incurred in connection with *Perry* (Decision as to Le Anne Smith),

AWA Docket No. 05-0026, 2013 WL 8213619 (U.S.D.A. Sept. 11, 2013). The Judicial Officer found Ms. Smith was a prevailing party, the Animal and Plant Health Inspection Services' (APHIS) position in the adversary adjudication regarding Ms. Smith was not substantially justified, and no special circumstances made an Equal Access to Justice Act award to Ms. Smith unjust. The Judicial Officer rejected APHIS contentions that: (1) Ms. Smith's EAJA application was not timely filed, (2) Ms. Smith failed to identify the APHIS position that Ms. Smith alleged was not substantially justified, (3) Ms. Smith failed to provide a net worth exhibit, and (4) Ms. Smith failed to provide full documentation of the fees and expenses she incurred in connection with her defense in *Perry*, AWA Docket No. 05-0026. The Judicial Officer found Administrative Law Judge Jill S. Clifton erroneously awarded attorney fees at an attorney fees rate of \$150 and the Judicial Officer applied the \$125 attorney fees rate which was applicable on the date APHIS initiated *Perry*, AWA Docket No. 05-0026, as required by 7 C.F.R. § 1.186(b).

In *Caudill*, EAJA Docket No. 13-0186, decided by the Judicial Officer on February 23, 2015, the Judicial Officer denied Jennifer Caudill's request for an award for attorney fees and other expenses which she incurred in connection with *Caudill* (Ruling Granting Pet. to Reopen and Ruling Granting Request to Issue an Order Dismissing the Proceeding), AWA Docket No. 10-0416, 2014 WL 4311060 (U.S.D.A. May 16, 2014). The Judicial Officer concluded that *Caudill*, No. 10-0416, an Animal Welfare Act license termination proceeding instituted under 7 U.S.C. § 2133, was not an "adversary adjudication," as that term is defined in 5 U.S.C. § 504(b)(1)(C) and, citing *Buckhannon Board and Care Home, Inc. v. West Virginia Dep't of Health and Human Resources*, 532 U.S. 598 (2001), concluded Ms. Caudill was not a "prevailing party" in *Caudill* (Ruling Granting Pet. to Reopen and Ruling Granting Request to Issue an Order Dismissing the Proceeding), AWA Docket No. 10-0416, 2014 WL 4311060 (U.S.D.A. May 16, 2014).

In *Jenne* (Order Denying Pet. to Reopen Hearing), HPA Docket No. 13-0308, decided by the Judicial Officer on April 10, 2015, the Judicial Officer denied Justin Jenne's request to reopen the hearing to adduce additional evidence. The Judicial Officer rejected Mr. Jenne's assertion that his status as a pro se litigant constituted good reason under 7 C.F.R. § 1.146(a)(2) for his failure to adduce the evidence at the March 11, 2014, hearing.

In *Jenne*, HPA Docket No. 13-0308, decided by the Judicial Officer on April 13, 2015, the Judicial Officer affirmed Administrative Law Judge Janice K. Bullard's Decision and Order: (1) concluding that, on August 27, 2012, Justin Jenne entered and allowed the entry of a horse known as "Led Zeppelin" at the 74th Annual Tennessee Walking Horse National Celebration Show in Shelbyville, Tennessee, for the purpose of showing or exhibiting Led Zeppelin while Led Zeppelin was sore, in violation of 15 U.S.C. §§ 1824(2)(B) and 1824(2)(D); (2) assessing Mr. Jenne a \$2,200 civil penalty; and (3) disqualifying Mr. Jenne for one year from showing, exhibiting, or entering any horse and from judging, managing, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. A United States Department of Agriculture veterinary medical officer found Mr. Jenne's horse, Led Zeppelin, manifested abnormal bilateral sensitivity thereby raising the statutory presumption (15 U.S.C. § 1825(d)) that Led Zeppelin was sore. The Judicial Officer rejected Mr. Jenne's contention on appeal that he rebutted the statutory presumption. The Judicial Officer also rejected Mr. Jenne's request that the

Judicial Officer reduce or eliminate the \$2,200 civil penalty assessed by the ALJ. The Judicial Officer held the burden is on the respondent to come forward with some evidence indicating an inability to pay the civil penalty and Mr. Jenne failed to adduce available evidence of his inability to pay a civil penalty at the March 11, 2014, hearing.

In *Burnette Foods, Inc.*, AMAA Docket No. 11-0334, decided by the Judicial Officer on June 19, 2015, the Judicial Officer denied Burnette Foods, Inc.'s request for modification of, and exemption from, the Tart Cherry Order (7 C.F.R. pt. 930). The Judicial Officer rejected Burnette's contentions that CherrCo, Inc., was a "sales constituency" as that term is defined in 7 C.F.R. § 930.16, that the Cherry Industry Administrative Board was not constituted as required by 7 C.F.R. § 930.20, that the formula for determining the optimum supply of tart cherries set forth in 7 C.F.R. § 930.50 was unlawful because the formula did not include imported tart cherry products, and that the failure to exempt the canned segment of the tart cherry industry from volume restrictions in the Tart Cherry Order is unlawful. The Judicial Officer held that a proceeding under 7 U.S.C. § 608c(15)(A) is not a forum in which to consider questions of policy, desirability, or effectiveness of an order and that the modifications to the Tart Cherry Order sought by Burnette involved questions of a policy, desirability, or effectiveness.

In *Jones*, HPA Docket No. 13-0053, decided by the Judicial Officer on June 29, 2015, the Judicial Officer affirmed Administrative Law Judge Janice K. Bullard's (ALJ) Decision and Order: (1) concluding that, on May 29, 2010, Randall Jones exhibited and allowed the exhibition of a horse known as "Jammin The Blues" at the 40th Annual Spring Fun Show in Shelbyville, Tennessee, while Jammin The Blues was sore, in violation of 15 U.S.C. §§ 1824(2)(A) and 1824(2)(D); (2) assessing Mr. Jones a \$4,400 civil penalty; and (3) disqualifying Mr. Jones for four years from showing, exhibiting, or entering any horse and from judging, managing, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. The Judicial Officer stated Mr. Jones failed to file a timely answer in response to the Complaint and is deemed, for the purposes of the proceeding, to have admitted the allegations in the Complaint and his failure to answer the Complaint constitutes a waiver of hearing. The Judicial Officer rejected Mr. Jones' contention that he was not properly served with the Complaint because he did not receive actual notice of the Complaint. The Judicial Officer explained that the Hearing Clerk properly served Mr. Jones with the Complaint in accordance with 7 C.F.R. § 1.147(c)(1). The Judicial Officer also rejected Mr. Jones' contention that the ALJ's Decision and Order should be set aside because he (Mr. Jones) had no legal training and may not clearly understand the procedures applicable to the proceeding.

In *Jenne* (Order Denying Pet. to Reopen Hearing), HPA Docket No. 13-0080, decided by the Judicial Officer on July 16, 2015, the Judicial Officer denied Justin Jenne's request to reopen the hearing to adduce additional evidence to show his history of compliance with the Horse Protection Act and his inability to pay a civil penalty. The Judicial Officer found that Mr. Jenne failed to set forth a good reason for his failure to adduce the evidence at the March 11, 2014, hearing, as required by 7 C.F.R. § 1.146(a)(2).

In *Jenne*, HPA Docket No. 13-0080, decided by the Judicial Officer on July 17, 2015, the Judicial Officer affirmed Administrative Law Judge Janice K. Bullard's (ALJ) Decision and Order: (1) concluding that, on April 16, 2009, Justin Jenne entered a horse known as "Jose's Flamingo Dancer" at the Spring Jubilee Charity Horse Show in Harrodsburg, Kentucky, for the

purpose of showing or exhibiting Jose's Flamingo Dancer while Jose's Flamingo Dancer was sore, in violation of 15 U.S.C. § 1824(2)(B); (2) assessing Mr. Jenne a \$2,200 civil penalty; and (3) disqualifying Mr. Jenne for one year from showing, exhibiting, or entering any horse and from judging, managing, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. A United States Department of Agriculture animal care specialist found Mr. Jenne's horse, Jose's Flamingo Dancer, manifested abnormal bilateral sensitivity thereby raising the statutory presumption (15 U.S.C. § 1825(d)) that Jose's Flamingo Dancer was sore. The Judicial Officer rejected Mr. Jenne's contention on appeal that he rebutted the statutory presumption. The Judicial Officer also rejected Mr. Jenne's request that the Judicial Officer reduce or eliminate the \$2,200 civil penalty assessed by the ALJ. The Judicial Officer held the burden is on the respondent to come forward with some evidence indicating an inability to pay the civil penalty and Mr. Jenne failed to adduce available evidence of his inability to pay a civil penalty at the March 11, 2014, hearing. The Judicial Officer found that the ALJ followed the Secretary of Agriculture's long-held position that digital palpation is a highly reliable method to determine whether a horse is sore and rejected the contention that the ALJ's expression of her personal views on the reliability of digital palpation, was error.

In *Rosberg*, OFPA Docket No. 12-0216, decided by the Judicial Officer on August 20, 2015, the Judicial Officer adopted Administrative Law Judge Janice K. Bullard's (ALJ) Decision and Order on Remand in which the ALJ granted a Motion for Summary Judgment filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture (Administrator). The Judicial Officer found the Administrator supported his Motion for Summary Judgment and, citing *Gannon Int'l, Ltd. v. Blocker*, 684 F.3d 785, 794 (8th Cir. 2012), held the burden then shifted to Mr. Rosberg to defeat summary judgment by setting forth specific facts, in affidavits, deposition transcripts, exhibits, and other evidence, that raise a genuine issue for trial. The Judicial Officer rejected Mr. Rosberg's contention that he set forth specific facts that raise a genuine issue for trial in sworn statements from two witnesses.

PENDING CASE APPEALED TO THE JUDICIAL OFFICER

1. Knapp, AWA Docket No. 09-0175, 2013 WL 8213607 (U.S.D.A. June 3, 2013), aff'd in part and remanded, No. 14-60002, 2015, WL 4604914 (5th Cir. July 31, 2015). Referred to the Judicial Officer September 22, 2015.